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CITATIONS

563389—43——1

Statutes—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 158

THE B. F. GOODRICH COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 95–108) is reported at 48 F. Supp. 453. The opinion of the Circuit Court of Appeals (R. 285–301) is reported at 135 F. 2d 456.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 302). The petition for a writ of certiorari was filed July 13, 1943, and was granted October 11, 1943 (R. 304).

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the deduction proviso of Section 9 (a) of the Agricultural Adjustment Act is inoperative because not separable from the taxing provision in Section 9 (a), which this Court has held invalid.

2. If the deduction proviso of Section 9 (a) of the Agricultural Adjustment Act is separable from the remainder of Section 9 (a) and operative, whether that proviso undertakes to allow a deduction—against the weight of articles subject to the manufacturers' sales tax under Section 602 of the Revenue Act of 1932—for the weight of the material in those articles subjected to the tax imposed on floor stocks by Section 16 of the Agricultural Adjustment Act.

3. Whether the District Court erred in holding that petitioner had failed to prove that the Pacific Goodrich Rubber Company had "not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee."

4. Whether the variance between the cause of action for refund of taxes which the petitioner now asserts and the grounds set up in its claims

for refund is fatal; and, if so, whether the variance was waived.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 38–46.

STATEMENT

This is an action to recover manufacturers' excise tax paid under protest by the Pacific Goodrich Rubber Company, a Delaware corporation.[1] The case was tried in the District Court upon a stipulation of facts (R. 80–92, 161–162) including exhibits (R. 191–256). The pertinent facts may be summarized as follows:

The taxes paid and the claims for refund.—From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 142) manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the floor stocks tax provided for by Section 16 (a) of the Agricultural Adjustment Act (Appendix, *infra*, p. 41) (R. 144–146).[2] In computing the manufacturers' sales tax imposed

[1] The Collector to whom payment was made died prior to commencement of the action, which, therefore, was brought against the United States (R. 142).

[2] The floor stocks tax was at the rate of $0.044184 per pound, and thus Pacific Goodrich Rubber Company paid $31,185.33 in floor stocks taxes on the 705,806 pounds of processed cotton. (See R. 144–145.)

upon these tires by Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*, p. 38), Pacific Goodrich Rubber Company (herein referred to as "Pacific")—in reliance upon the proviso clause of Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*, pp. 39–40)—deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the floor stocks tax (R. 145).

The Commissioner of Internal Revenue disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the manufacturers' sales tax, and demanded, as an additional tax, the sum of $15,880.64, which was arrived at by applying the rate of the tax to the weight of processed cotton which Pacific had deducted in its computation of the tax (R. 146). Pacific paid the additional manufacturers' sales tax so demanded, and the assessed interest of $569.75 thereon, on April 18, 1934, and July 27, 1934, respectively (R. 146, 197). No part of the additional tax or interest has been refunded either to Pacific or to petitioner (R. 150).[3]

On June 30, 1934, Pacific, by its president and its secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company * * * all rights, claims, and choses in action

[3] The record seems to establish, however, that a refund of $62.52 of the interest was actually allowed April 12, 1935 (R. 202).

of every nature and description which said Pacific Goodrich Rubber Company now has or shall have * * *," and at the close of business on that day Pacific delivered all its assets in kind to the petitioner (R. 148; Ex. A, R. 191–193, 228, 230). The assignment was ratified by Pacific's board of directors and stockholders on July 6, 1934, "as a distribution in kind" of all the assets of the corporation to its sole stockholder, the B. F. Goodrich Company (R. 147, 228, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate and to take the measures necessary to dissolve the corporation (R. 230–231). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 141, 233–235).

On August 14, 1935, the officers of Pacific executed on behalf of the corporation a second assignment (R. 148; Ex. B, R. 194–195), under the terms of which Pacific did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind," including "particularly its claim for refund of excise tax illegally paid to the United States * * * in the sum of $16,450.39. * * *."

Pacific and petitioner filed, on August 31, 1935, claims for refund of the additional manufacturers' sales taxes and interest which Pacific had paid (Ex. D, R. 199–202; Ex. F, R. 209–214).

Both of these claims were predicated upon the ground that Pacific was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which Pacific had paid a floor stocks tax under Section 16 (a) of the Act. In addition, petitioner stated in its claim for refund (Ex. F; R. 209–213) that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148–149, 211–213).

Pacific and petitioner filed amended claims for refund on April 21, 1936, which differed from the original claims only in the statement that Pacific had not included the taxes in the prices of the tires on which the tax was assessed (R. 149; Ex. E, R. 204–208; Ex. G, R. 215–220).

The Commissioner on April 8, 1936, rejected Pacific's original claim for refund (R. 150) and on May 22, 1936, its amended claim for refund (R. 223–224). A ground common to both letters of rejection was that Section 9 (a) of the Agricultural Adjustment Act did not authorize a deduction of the weight of the cotton contents of tires on which a floor stocks tax had been paid under Section 16 (a) of that act, in computing the manufacturers' sales tax imposed on tires by Section 602 (1) of the Revenue Act of 1932. A further reason given for the rejection of Pacific's amended claim was that such claim failed to set

forth any new and material evidence. (R. 223–224.)

On the same day, May 22, 1936, the Commissioner, by letter sent to petitioner, rejected petitioner's original and amended claims (R. 149–150).

The pleadings and trial.—On October 1, 1937, petitioner filed in the District Court its original petition (R. 2–25) for recovery of the additional manufacturers' excise tax collected from Pacific in 1934. That petition asserted title to Pacific's choses in action by virtue of the assignment of June 30, 1934, set forth in the petition (R. 6–25).

The United States demurred (R. 28–31), and later amended its demurrer to add a challenge under R. S. 3477 (Appendix, *infra*, pp. 44–45) to the validity of Pacific's assignment of June 30, 1934 (R. 33–34). On May 21, 1938 (R. 38), petitioner then amended its petition to set forth Pacific's assignment of August 14, 1935 (R. 35–37). The United States demurred to the petition as amended on the grounds set forth in its original demurrer as amended (R. 39); this demurrer was overruled (R. 41). The United States then answered (R. 41–48). The answer did not assert that there was a variance between the claim for refund and the petition as amended; it did allege, among other things, that the provision of the Agricultural Adjustment Act for a deduction from the weight of articles subject to manufacturers' excise tax under the Revenue Act of 1932 in

terms applied only where "a processing tax" had been paid and did not apply where, as here, the taxes paid were floor stocks taxes (R. 42–43), and, in any event, was invalid "for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect" (R. 48).

Thereafter, on February 5, 1940, petitioner filed its first amended petition (R. 50–78) which differed little from the original petition save to allege (R. 51) that petitioner as the sole stockholder of Pacific "became by operation of law, pursuant to a distribution in kind to it by Pacific * * *," on June 30, 1934, the sole owner of "all the rights, claims, and choses in action" which Pacific then had. Pacific's assignments of June 30, 1934, and August 14, 1935, were set out at length "as physical evidence, affirmative proof and in confirmation of" this allegation (R. 51). Three days before the filing of this first amended petition the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in plaintiff's First Amended Petition," and that the Government's previous answer as amended should be deemed an answer to petitioner's first amended petition (R. 78–79). The case was then tried February 10, 1940 (R. 93).

The facts, including exhibits (R. 191–256), were stipulated (R. 80–92, 161–162). As the District

Court noted (R. 108), no books of account, sales records, or other documentary evidence were submitted as evidence that the taxpayer had not included the manufacturers' sales tax in the price of the tires with respect to which it was imposed or had not collected the amount of the tax from the vendees.

Part of the stipulation was as to the testimony which two officers of the taxpayer would give, if sworn as witnesses, and the District Court found (R. 152) that the two witnesses testified as stipulated (R. 81–83, 84–86, 87–89, 90–92). This testimony was received subject to the objection of the Government as to its sufficiency to prove the fact in issue (i. e., that Pacific had not passed the tax on to its vendees) (R. 108; cf. 119, 138).

The testimony so stipulated may be summarized thus:

The secretary of the taxpayer, Pacific Goodrich Rubber Company, one J. C. Herbert, testified (R. 81–83) that he had charge of the books and records of that corporation and knew that petitioner owned all of Pacific's issued shares, and the witness identified the two assignments of assets (Ex. A and B, R. 191–193, 194–196) executed by Pacific to the petitioner under dates of June 30, 1934, and August 14, 1935, respectively.

George Hubbell, who was cashier and at times auditor of Pacific, testified that he kept the books and records of Pacific (R. 84); that they showed

the quantity and type of tires which that company manufactured between August 1, 1933, and January 5, 1934, and the amount of cotton therein which on August 1, 1933, was contained in articles which Pacific owned and which were processed from cotton (R. 84); that he knew whether or not there was included in the price of the tires which Pacific manufactured and sold during the period August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in those tires, and whether any additional billing was ever made to purchasers of those tires after the assessment of the additional manufacturers' excise tax which is in suit (R. 85); that Pacific did not include nor intend to include in the price of its tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during that period (R. 91); that the prices at which Pacific sold its tires during that period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which it sold tires containing processed cotton on which a tax was payable under Section 9 (a) of that Act; and that no additional billing was made to the purchasers of taxpayer's tires after the assessment of the additional manufacturers' excise tax, now in suit (R. 91–92).

The decision of the District Court.—The District Court held (1) that the literal language of the proviso clause of Section 9 (a) of the Agricultural Adjustment Act should be disregarded in favor of a construction permitting taxpayers to compute any manufacturers' sales tax imposed on them by Section 602 of the Revenue Act of 1932, by deducting from the gross weight of the tires sold the weight of the processed cotton therein on which they had paid either a processing tax under Section 9 (a) or a floor stocks tax under Section 16 of the Agricultural Adjustment Act (R. 98–100, 153); (2) that the proviso clause of Section 9 (a) of the Agricultural Adjustment Act was valid despite the unconstitutionality of all other provisions of Section 9 (a) and Section 16 (R. 100, 154–155). The District Court then held (R. 102–108, 155–156), however, that petitioner was not entitled to recover the manufacturers' excise tax which Pacific had paid, because: (a) Petioner's right, if any, to refund vested in it by reason of the two written assignments which Pacific executed in petitioner's favor on June 30, 1934, and August 14, 1935, which assignments to the extent they undertook to convey a claim against the United States were null and void, *ab initio*, under the provisions of Section 3477, Revised Statutes, and conferred no right of succession (R. 105, 155);[4] (b) petitioner was not "the person

[4] In this connection the District Court also concluded that the petitioner acquired no right to refund of the tax involved

who paid the [manufacturers' excise] tax" within the requirement of Section 621 (d) of the Revenue Act of 1932, and hence was not entitled to refund of it (R. 106, 156); and (c) that the evidence failed to establish that Pacific had absorbed the tax sued for, and had not passed it on to the vendees or purchasers of its tires (R. 107–108, 156).

The decision of the Circuit Court of Appeals.—In the Circuit Court of Appeals the United States defended the judgment of the District Court upon the several grounds considered and passed upon by the District Court (R. 95–108, 153–156). The Circuit Court of Appeals, however, passed upon only one of the grounds of defense, sustaining it, and in consequence found it unnecessary to express a conclusion concerning the other defenses. In summary, the Circuit Court of Appeals held that the ground for refund alleged in petitioner's first amended petition of February 1940 was different from the grounds for refund set up in petitioner's claim for refund; and that the United States had not waived the variance (R. 295–301).

SUMMARY OF ARGUMENT

1. The proviso in Section 9 (a) of the Agricultural Adjustment Act of 1933, which authorizes a deduction for purposes of the manufacturers' sales tax on account of cotton on which the proc-

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by virtue of the ownership of all of Pacific's stock, or by the dissolution of that company, or by the distribution in kind by that company of its assets (R. 155).

essing tax was paid, became inoperative when this Court held in *United States* v. *Butler*, 297 U. S. 1, that the taxing provisions in that Act were unconstitutional. Therefore it is not material whether the deduction proviso applied to cotton subjected to the floor stocks tax.

The deduction proviso was an adjunct of the invalid taxing provision and would have been meaningless without it. Clearly Congress would not have enacted the deduction proviso had it not also enacted the taxing provision. Moreover, Congress would not have wished the deduction proviso to remain effective after the invalidation of the processing tax because to do so would give taxpayers a deduction under the manufacturers' sales tax on account of a tax they did not have to pay and could recover from the collector. Such a consequence would result in tax exemption instead of relief from double taxation, a result Congress would not intend.

This conclusion is borne out by two actions taken by Congress after the *Butler* decision. Congress enacted elaborate provisions for the refund of processing taxes and others collected under the Act, and these provisions authorized refunds without diminution on account of any tax benefit obtained under the manufacturers' tax; in view of Congress' evident purpose that invalid taxes should be refunded only to the extent they had not been passed on, it is clear Congress believed that

none of the invalid taxes would be passed on to the Government through the deduction proviso. Moreover, Congress reenacted the portions of the Act which it intended to remain operative and expressly stated that the reenacted provisions were intended to remain effective notwithstanding the *Butler* decision. As neither the deduction proviso nor any other portion of Section 9 (or Section 16, the floor stocks provision) was thus reenacted, it is evident that Congress did not intend the deduction proviso to survive the *Butler* decision.

2. Even if still operative, the deduction proviso could not properly be construed to authorize a deduction on account of cotton subjected to the floor-stocks tax. The latter tax was imposed by Section 16 (a) (1), the processing tax by Section 9 (a). The deduction proviso was attached to the latter section and by its terms applied only to cotton on which "a processing tax" was paid. The floor-stocks tax, a companion to the processing tax, was not a tax on processing as defined in the Act but on the ownership on a certain day of goods which had already been processed.

The literal language of the Act expresses the Congressional purpose. If Congress had extended the deduction proviso to floor-stocks taxes it would have allowed a deduction for a tax destined to be refunded under Section 16 (a) (2) whenever the Secretary should declare the proc-

essing tax terminated as to cotton. Furthermore, the history of the proviso in Congress shows that it was the subject of study and some revision, so its language must be accepted as having been deliberately chosen.

3. Even if the proviso were still operative and could be construed as petitioner must contend that it should be, the decisions below against petitioner would be supportable. The trial court found that the evidence did not show that the taxpayer had not passed the tax on to its customers and therefore a necessary statutory requirement was not met. The record does not justify that this finding be disturbed.

4. The court below held that a fatal variance existed between petitioner's claims for refund and its amended complaint, and that the Government had not waived the variance. The absence of a waiver is clear since even an express waiver would have been ineffective, and since a waiver cannot be found from the mere failure of the Government to make a particular argument in the trial court. The decision that a fatal variance existed appears to be a logical extension of well settled rules.

ARGUMENT

Introductory.—In the District Court and the Circuit Court of Appeals, the United States urged points I, II, and III hereinafter argued. Point IV, argued in the Circuit Court of Appeals and on

which its decision for the United States rests, was not urged in the District Court but was suggested by that court's opinion (R. 95, 102–103). In its brief in opposition to the granting of certiorari (p. 2), the United States made known the existence of issues not adverted to in the opinion below and its intention, should certiorari be granted, of arguing them. In this brief we argue Point I, on which we believe affirmance should rest, Point II, which we believe logically need not be reached because of Point I but which is equally clear, and Points III and IV, on which the decisions below rested (cf. *Le Tulle* v. *Scofield*, 308 U. S. 415, 421).

I

WHEN THE TAXING PROVISIONS IN SECTIONS 9 (A) AND 16 (A) (1) OF THE AGRICULTURAL ADJUSTMENT ACT OF 1933 WERE DECLARED INVALID BY THIS COURT THE DEDUCTION PROVISO IN SECTION 9 (A) BECAME INOPERATIVE

Section 9 (a) of the Agricultural Adjustment Act of 1933 (Appendix, *infra*, pp. 39–40) imposed a processing tax and concluded with a proviso that amounts of cotton subjected to this tax should be allowed as a deduction in the computation of manufacturers' sales taxes imposed by the Revenue Act of 1932 on the basis of weight. Section 16 (a) (1) of the Agricultural Adjustment Act of 1933 (Appendix, *infra*, p. 41) imposed a companion tax on floor stocks, without such a proviso.

The parties are in disagreement as to whether the proviso in Section 9 (a) authorized a deduction for cotton subjected to the floor-stocks tax as well as for that subjected to the processing tax, and in the next succeeding portion of this brief (*infra*, pp. 23–30) we argue that it did not. However, the Court need not settle that disagreement if, as we believe, the proviso became inoperative when this Court in *United States* v. *Butler*, 297 U. S. 1, declared that the taxing provisions (Sections 9 (a) and 16 (a) (1)) were unconstitutional. And, as stated, we believe that the proviso became inoperative and does not authorize any deduction at all since it was designed solely to prevent double taxation arising from the imposition of two taxes on the same subject and one of those taxes was held unconstitutional and uncollectible.

The District Court passed on this contention adversely to our position (R. 100), on the sole ground that Section 14 of the Act (Appendix, *infra*, p. 40) declared the Act separable.[6] It seems clear, however, that this omnibus separability provision is not conclusive.[7] To give con-

[6] The Circuit Court of Appeals did not reach the point since it decided the case favorably to the Government on another ground (R. 295–301).

[7] In fact, it was disregarded by this Court in *United States* v. *Butler*, *supra*. The taxes there invalidated did not themselves regulate production, as those invalidated in the *Child Labor Tax Case*, 259 U. S. 20, had sought to do; on the contrary, they were held invalid because of the use to which their proceeds were to be put—regulation of production.

clusive effect to omnibus separability provisions often would produce results manifestly not desired by the legislature. An example of this is *Mazurek* v. *Farmers' Mutual Fire Ins. Co.*, 320 Pa. 33, in which the only valid provision of an act, except for the separability provision itself, was a section repealing the earlier law which the invalid act was to replace. To have given blind effect to the separability clause would have produced an abyss in the law, clearly not intended by the legislature; the separability provision was disregarded and the repealer held inoperative. The decisions of this Court recognize the impropriety of being blindly bound by omnibus separability clauses and establish that they create a presumption of separability and no more. *Electric Bond Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434.[8] The presumption is, of course, a strong one, as Chief Justice Hughes stated in his dissent in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 322:

> * * * when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision

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If the separability provision had been applied, the spending provisions would have been separated from the otherwise valid taxing provisions and the latter would have remained effective.

[8] For a discussion of the effect given separability clauses by this Court and a criticism of omnibus separability clauses, see Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Har. L. Rev. 76, 114–122, 123–128.

shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

The "inextricable tie" between the deduction proviso and the taxing provisions in the instant case is only slightly less obvious than was that between the repealer and the remainder of the act in *Mazurek* v. *Farmers' Mutual Fire Insurance Co., supra.* Of course Congress would not have enacted the deduction proviso had it not also enacted the taxing provisions. Without the taxing provisions, there would have been neither the double taxation intended to be avoided nor a processing tax to give rise to the condition on which the proviso was to allow a deduction. Thus if the test of separability is, as this Court has sometimes said,[9] whether Congress would have enacted the one if it had not also enacted the other, the deduction proviso is *a fortiori* inseparable and inoperative.

A test of separability more often stated and which probably is a more accurate guide is whether the legislature would have wished the provision in question to remain operative if other

[9] *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 184–185; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313. This test was, however, not applied in *Kay* v. *United States*, 303 U. S. 1, 7, where a section was held separable which would not have been passed had not the rest of the act been passed but which Congress would have wanted to remain effective even if the rest of the act were held invalid.

portions of the act should subsequently be held invalid. *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241.[10] Under this test as well, the conclusion seems warranted that the proviso became inoperative when the taxing provisions were held invalid. It seems unreasonable to suppose that Congress would have wanted the valid manufacturers' sales tax to be reduced on account of the payment of an unconstitutional processing tax. Unless special legislation should be passed, one who paid an unconstitutional tax presumably would have a common law action of assumpsit against the collector for its recovery (cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 341–342; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379), and any judgment against the collector would be paid from the Treasury (R. S. 989, 28 U. S. C. 842). Probably any such recovery would be of the entire unconstitutional tax paid, without offset for any saving effected under other taxing statutes by reason of the deduction proviso. If at the same time the deduction in computing the manufacturers' sales tax should remain in effect, the deduction proviso, no longer necessary to prevent double taxation, would become the source of an exemption even from single taxation. The

[10] As noted in footnote 9, *supra*, p. 19, the decision in *Kły* v. *United States*, *supra*, is reconcilable with this test and not with the preceding one.

conclusion is therefore justified, we submit, that Congress must have intended the deduction proviso to be "inextricably tie(d)" to the taxing provisions, and to become inoperative if the taxing provisions should fall.[11]

This conclusion need not, however, rest upon assumptions however well grounded. Congress took action after the decision in *United States* v. *Butler, supra,* which demonstrates that it regarded the deduction proviso as "inextricably tie(d)" to the taxing provisions and hence inoperative. It added to the Revenue Act of 1936 a complete title (Title VII; Secs. 901–917) providing elaborately for the refund of the invalid processing taxes and floor stocks taxes (49 Stat. 1747).[12] This title became effective June 22, 1936,[13] less than six months after the *Butler* decision. Significantly, although it carefully limits the permissible refund to insure that the taxpayer will not secure a refund of taxes which he passed

[11] For decisions holding inoperative provisions which, like the deduction proviso, were merely adjunctive to the provisions held invalid, see: *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 243; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304–306; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

[12] Under this title Pacific became entitled to a refund of the floor stocks taxes it had paid, if it could establish that it had not passed the tax on to its customers. The record does not show whether either Pacific or petitioner claimed such a refund.

[13] It was upheld in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

on to others and which consequently represented no burden to him (Section 902, Appendix *infra*, pp. 41–42; section 907), it contains no provision reducing the refund by amounts which he passed on to the Government through a deduction in computing the manufacturers' sales tax."[14] In view of Congress' concern that the taxpayer recover only the tax which had burdened him, this omission cannot be attributed to a desire to let the taxpayer have his refund and the manufacturers' sales tax saving too. The only rational explanation is that Congress regarded the deduction proviso as inoperative with the result that the deduction would be disallowed in computing the manufacturers' sales tax.

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[14] The only provision which could be offered in support of a contrary position is Section 911, which states: "No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person." On its face this provision appears inapplicable since the deduction proviso in Section 9 (a) authorized neither a refund nor a credit but a deduction. This construction is confirmed by the statement of the originators of Title VII, the Senate Committee on Finance, in their report (S. Rep. 2156, 74th Cong., 2nd sess.) where they say (p. 36): "Section 911 is designed to prevent two refunds with respect to the same amount collected under the Agricultural Adjustment Act." The original act contained provisions authorizing refunds in numerous situations which were reenacted by Title IV of the Revenue Act of 1936. The desire was to prevent duplicate refunds under these various provisions. See also Article 205, Treasury Regulations 96.

A further Congressional act points to the same conclusion. By the Act of June 3, 1937, c. 296, Secs. 1 and 2 (50 Stat. 246; 7 U. S. C., Sec. 601 note), Congress reenacted most of the provisions of the Agricultural Adjustment Act of 1933, but not Sections 9 and 16. That this action is to be taken as an indication of what provisions Congress thought separable from the unconstitutional provisions is evidenced by the preamble to the 1937 Act, in which Congress said in part:

> The following provisions * * * having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted * * *.

We submit therefore that the deduction proviso in Section 9 (a) became inoperative when the taxing provisions fell. This point is dispositive of the case and we suggest that the succeeding points accordingly need not be considered. They are, however, fully discussed hereinafter.

II

IF THE DEDUCTION PROVISO WERE STILL OPERATIVE, IT WOULD NOT AUTHORIZE A DEDUCTION IN THE COMPUTATION OF THE MANUFACTURERS' SALES TAX ON ACCOUNT OF COTTON ON WHICH A FLOOR STOCKS TAX WAS PAID

In computing the manufacturers' sales tax due from it under Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*, p. 38), for tires

sold, Pacific deducted from the gross weight of the tires the 705,806 pounds of processed cotton contained in the tire fabrics, threads, and other material from which the tires had been made and upon which Pacific had paid a floor stocks tax pursuant to Section 16 of the Agricultural Adjustment Act (R. 143–145). Pacific did this upon the theory that the proviso clause to Section 9 (a) of the Agricultural Adjustment Act authorized it. The Commissioner disallowed the deduction and assessed a deficiency (R. 88), which was paid (R. 89) and is the subject of this action for refund.

Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*, pp. 39–40) in terms authorized the collection of a processing tax (later declared by this Court to be unconstitutional, *United States* v. *Butler*, 297 U. S. 1) "upon the first domestic processing of" any agricultural commodity which the Secretary of Agriculture should determine to be basic. Section 9 (d) (2) of the Agricultural Adjustment Act (Appendix *infra*, p. 40) defined, in the case of cotton, the term "processing" *as meaning* "the spinning, manufacturing, or other processing (except ginning) of cotton." The section was prospective in its operation.

The proviso clause of Section 9 (a) authorized a deduction under defined circumstances for manufacturers' sales tax purposes where "a *processing* tax has been paid." (Italics ours.) This clause read as follows:

> *Provided*, That upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturer's sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a *processing tax* has been paid. [Italics ours.]

Thus from the statutory definition it appears that a deduction was authorized on account of the payment of a tax on "the spinning, manufacturing, or other processing (except ginning) of cotton."

In its original official appearance in the Statutes at Large, Section 16 appears under the title "Floor Stocks" (48 Stat. 40). It imposed a tax, which came to be known as the "floor stocks tax," on finished goods held for sale or other disposition (except retail sale) at the time when the processing tax should become effective on the commodity contained in processed form in those goods (Section 16 (a) (1), Appendix, *infra*, p. 41). This "floor stocks tax" was in an amount equal to the processing tax, which it thus complemented. It was not, however, a "processing tax," as Congress itself expressly recognized in 1935 when it added Section 7 (7) [7 U. S. C. 608 (7)] and referred to the two taxes as "the processing tax, and/or the corresponding floor-stocks tax" (49

Stat. 752).[15] Since Section 16 did not contain a deduction proviso, nor refer to that in Section 9 (a) which by its own terms applied only where the "processing tax" was paid, it is evident that the language of the Act, literally applied, does not authorize a deduction on account of cotton subjected to the "floor stocks tax."

Application of the usual rules of construction would disallow the deduction sought: a proviso is presumed in the absence of evidence of a contrary intention to refer "only to the provision to which it is attached" (*United States* v. *McClure*, 305 U. S. 472, 478); a deduction will not be held allowable unless it comes clearly within a statutory provision therefor (*Helvering* v. *Ohio Leather Co.*, 317 U. S. 102, 106). Disregard of these rules and an independent search for the Congressional intent will produce the same result.

1. Allowance of the deduction in the case of the floor stocks tax was not necessary to prevent the double taxation sought to be avoided. Supple-

[15] Congress emphasized the distinction between the two taxes by providing different procedures for the refund of each after their invalidation in *United States* v. *Butler*, *supra*. Claims for refund of processing taxes, if denied by the Commissioner, went to the Processing Tax Board of Review, with appeal to the circuit courts of appeals (Rev. Act of 1936, Sec. 906, Appendix, *infra*, p. 43). If claims for refund of floor stocks taxes were denied by the Commissioner, suit therefor could be brought in the Court of Claims or the district courts (*id.* Sec. 905, Appendix, *infra*, p. 43). See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 341–345, where the two procedures are contrasted and upheld.

menting the floor stocks tax was a floor stocks refund which would normally be expected to cancel out the floor stocks tax. The operation of the tax scheme was as follows: whenever the Secretary of Agriculture should determine that conditions with respect to a particular commodity made benefit payments desirable he would so proclaim and the processing tax would then become effective as to processing occurring thereafter (Sec. 9 (a), Appendix, *infra*, pp 39–40); the floor stocks tax thereupon would become due from the person in possession of floor stocks then on hand processed from that commodity (Sec. 16 (a) (1), Appendix, *infra*, p. 41); the processing tax would continue in effect until the Secretary should determine that benefit payments with respect to that commodity were no longer necessary, and would terminate at the close of the marketing year in which the Secretary should proclaim that determination (Sec. 9 (a)); on such termination of the processing tax, the person then in possession of floor stocks processed from that commodity would become entitled to a refund equal to the processing tax on the commodity contained in the floor stocks (Sec. 16 (a) (2), Appendix, *infra*, p. 41). Under this system a payment of floor stocks tax would be balanced by a refund on the termination of the processing tax on the commodity involved. If the inventory of the taxpayer remained constant the tax and the refund would be equal; if the inventory

fluctuated the refund might be either greater or less than the floor stocks tax. If Congress had intended to allow a deduction under the proviso in Section 9 (a) on account of floor stocks taxes, it is reasonable to suppose that it would not have wished the deduction to exceed the amount of cotton subjected to the floor stocks tax and not compensated for by the refund. But elaborate provisions would have been needed so to limit the deduction, and none which would do so are to be found in the Act.

2. The legislative history of the provision suggests that the limitation of the deduction proviso to processing taxes was deliberate. The proviso, which was not contained in the original bill, in that which first passed the House, nor in the bill reported by the Senate committee, first appeared as a Senate floor amendment proposed by Senator Bulkley (77 Cong. Rec. 1959). While its original form was different from the final form, it nevertheless limited the deduction to cotton on which "the processing tax" was paid (*id.*). The explanation by its proponent referred to a desire to avoid double taxation from the imposition of "the processing tax" (*id.*).[16] The amendment was adopted (77 Cong. Rec. 1960) but was changed to its present form in the conference (77 Cong. Rec.

[16] Senator Smith for the committee stated that the amendment had been offered in committee and rejected not because it was objectionable but because it seemed too unimportant (77 Cong. Rec. 1960).

3022–3023), and so adopted. The House managers stated the reason for the change as follows (77 Cong. Rec. 3025):

> The conference agreement makes it clear that this provision is to apply only in cases in which the processing tax has actually been collected and not refunded.

The significance of this statement is twofold: *first*, it shows that the fitness of the language used gave Congress some concern and the language eventually adopted was the result of study and alteration; *second*, the desire to limit the deduction to preclude one where the processing tax was paid but later refunded suggests that a deduction for the floor stocks tax was not authorized because as explained above an amount equal, or approximately so, to that tax would be refunded to the floor stocks taxpayer on termination of the processing tax.

Consequently we submit that even if it were presently operative the deduction proviso in Section 9 (a) would not authorize the deduction here sought. The District Court, which held otherwise, erred in departing from the language of the statute in preference to what it thought was a more just and equitable construction based on its understanding of the statutory scheme (R. 98–100).[17] The court overlooked, it appears, the

[17] The court's technique of fitting an unambiguous statute which is an act of legislative grace to its own notions of justice and equity appears to be inconsistent with *Riley Co.* v.

effect of the floor stocks refund provision (Sec. 16 (a) (2)) and the fact that its construction would give the taxpayer a deduction on account of a tax later to be refunded. However, as the District Court decided in favor of the Government on other grounds, its decision, affirmed by the Circuit Court of Appeals, was correct notwithstanding the error in its views on this point.

III

THE FINDING OF THE DISTRICT COURT THAT THE EVIDENCE DID NOT ESTABLISH THAT PACIFIC HAD NOT PASSED ON THE BURDEN OF THE TAX SHOULD NOT BE DISTURBED

Whether the economic burden of the manufacturers' sales taxes was passed on to Pacific's customers was a question of fact for the trial court to decide. Cf. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 407; *Colorado Bank* v. *Commissioner*, 305 U. S. 23 (in which the evidence was stipulated—see p. 28). The statute (Section 621 (d), Revenue Act of 1932, Appendix, *infra*, pp. 38–39) requires [15] that the person who paid the manufacturers' sales tax establish, in accordance with Regulations prescribed by the Commissioner with the approval of the Secretary, that the tax was not included in the price of the article,

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Commissioner, 311 U. S. 55, and *Helvering* v. *Ohio Leather Co.*, *supra*.

[15] Cf. Section 424 (a), Revenue Act of 1928, c. 852, 45 Stat. 791, involved in *United States* v. *Jefferson Electric Co.*, *supra*.

or if included that the tax was repaid to the ultimate purchaser, or that the taxpayer filed with the Commissioner the written consent of the ultimate purchaser to the allowance of the refund. The Regulations promulgated to implement that section of the statute are Article 71, Treasury Regulations 46 (Appendix, *infra*, pp. 45–46),[19] which require the person who paid the tax to file a claim with supporting data with the Commissioner as a condition precedent to a right to sue. Petitioner's claim is barred for failure of either Pacific or the petitioner to comply with that regulation, for their claims asserted nothing as to the necessary facts, but only asserted conclusions (R. 206–217). *United States* v. *Andrews*, 302 U. S.

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[19] The provisions of Article 71 were not excised even temporarily from the Regulations by T. D. 4605, XIV–2 Cum. Bull. 386 (1935), as petitioner asserts. (Br. 9–10, fn. 17.) New paragraphs were *added to* Article 71 by T. D. 4413, XII–2 Cum. Bull. 341, 342 (1933), and T. D. 4427, XIII–1 Cum. Bull. 389 (1934), for the purpose of implementing a new subparagraph (3) of Section 621 (a) of the Revenue Act of 1932 (as added by Section 4 (c), Act of June 16, 1933, c. 96, 48 Stat. 254, 255). Section 621 (a) (3) of the 1932 Act was then amended by Section 401 (b), Revenue Act of 1935, c. 829, 49 Stat. 1014. T. D. 4605 merely implements subparagraph (3) of Section 621 (a) of the statute as so amended, and the opening paragraphs of T. D. 4605 show that to be its purpose. *Shotwell Mfg. Co.* v. *Harrison*, 27 F. Supp. 422 (N. D. Ill.), is to the contrary, but wrong. Notwithstanding Judge Holley's ruling of April 5, 1938, the taxpayer stipulated the following month for the dismissal of its action with prejudice, and on June 15, 1938, that action was dismissed with prejudice.

517, 521. Moreover, there was no convincing evidence even at the trial.

Petitioner's only evidence in the District Court on this important factual point consisted of the conclusions (submitted in stipulation form) of one of its officers, its cashier-auditor (R. 84–85, 90–92). This evidence was submitted to the trial court subject to objection reserved by the Government as to its sufficiency as proof (R. 107, 108). It was not, as the trial court noted (R. 108), supplemented by corporate books of account, sales records, or other documentary evidence in support of the witness' conclusion that Pacific had not passed on the burden of the manufacturers' sales tax, and petitioner gave no explanation for the nonproduction of the crucial records. In these circumstances we submit that the District Court's finding that the proof failed to establish that Pacific had itself absorbed the burden of the tax should not be disturbed. *Luzier's, Inc.* v. *Nee*, 106 F. 2d 130 (C. C. A. 8th), certiorari denied, 309 U. S. 660. Cf. *Cudahy Packing Co.* v. *United States*, 126 F. 2d 429, 431 (C. C. A. 7th); *United States* v. *H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992 (C. C. A. 8th); *Colan Corp.* v. *United States*, 51 F. Supp. 598 (D. N. J.); *Lee Rubber & Tire Corp.* v. *United States*, 49 F. Supp. 6 (E. D. Pa.), all of which were suits for refund of floor stocks taxes paid under the Agricultural Adjustment Act. Cf. also *Finck Cigar*

Co. v. *Commissioner,* 134 F. 2d 261, 262–263 (C. C. A. 5th), certiorari denied October 11, 1943; *Honorbilt Products, Inc.* v. *Commissioner,* 119 F. 2d 797 (C. C. A. 3rd), both of which were suits for refund of processing taxes paid under the Agricultural Adjustment Act. See also *Cassatt* v. *Commissioner,* 137 F. 2d 745, 748 (C. C. A. 3rd), an income-tax case where there was stipulated testimony which the Board of Tax Appeals held insufficient.

IV

THE VARIANCE BETWEEN THE CLAIMS FOR REFUND, THE PLEADINGS, AND THE CAUSE OF ACTION SOUGHT TO BE LITIGATED

Government counsel in the District Court did not raise the question of variance between the claims for refund and petitioner's pleadings, or between the pleadings and the cause of action which petitioner sought to litigate, but relied upon the three other defenses, already discussed in this brief, any one of which, if sustained, would be dispositive of this case. The question of material variance was suggested by the opinion of the District Court (R. 102–104). That court concluded, however, that petitioner's title to the taxpayer's tax-refund rights had vested in the petitioner not by operation of law but by virtue of the two specific assignments of June 30, 1934, and August 14, 1935, respectively, for expressed valuable consideration, that such assignments

were void *ab initio* under Section 3477 of the Revised Statutes (31 U. S. C. 203; Appendix, *infra*, pp. 44–45), and hence that petitioner acquired no rights under them to any refund of the tax in suit (R. 105, 106–107, 155).

The Government supported the judgment before the Circuit Court of Appeals upon the ground of variance suggested by the District Court, as well as upon the several grounds which the Government had urged before the trial court. The Circuit Court of Appeals passed upon only one of the several grounds of defense urged before it and sustained that defense. In summary, the Circuit Court of Appeals held that the grounds for refund alleged in petitioner's first amended petition, filed February 5, 1940, were different from the grounds for refund set up in petitioner's claims for refund and that the United States had not waived the variance (R. 295–301).

Proceeding first to petitioner's contention that the United States waived the variance by failure to object to it in the District Court, the initial objection to this contention is that a waiver by the Government must be found if at all from affirmative acts, not from the negative act of failing to raise a particular objection. *Tucker* v. *Alexander*, 275 U. S. 228, the foundation of petitioner's waiver argument, involved an oral stipulation between

counsel which was construed as an express waiver which in the particular circumstances of that case Government counsel was competent to make. Mere failure to make an available argument has not been regarded as a waiver and respondents (or appellees) have been held entitled to present in support of judgments arguments not made in the lower court. See *Helvering* v. *Gowran,* 302 U. S. 238, 245–246; *LeTulle* v. *Scofield,* 308 U. S. 415, 421.

The second objection to petitioner's waiver argument is that even an express attempt to waive the variance by Government counsel would have been ineffective, since the attempt would have occurred long after the expiration of the period for filing claims for refund.[20] See *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 534, in which *Tucker* v. *Alexander, supra,* on which petitioner relies, was explained and limited.[21]

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[20] Pacific paid its tax April 18, 1934, and the $569.74 of interest thereon July 27, 1934 (R. 146; cf. R. 202). Petitioner filed its amended petition February 5, 1940 (R. 50–78) and thus long after the statute of limitations had run on claims for refund. See petitioner's concession on this point. (Br. 4, fn. 8.)

[21] The District Court found a waiver on a theory (R. 103), not urged here by petitioner, that the Commissioner waived objections to petitioner's right to sue on the assignment by not rejecting the refund claim on that ground. This theory, squarely contrary to *United States* v. *Garbutt Oil Co., supra,*

It is clear, as the Circuit Court of Appeals held, that there was a variance. In its claims for refund, petitioner represented itself as assignee by contract of Pacific's claims for refund (R. 292). The Government's demurrer brought petitioner to the tardy realization that its claims as assignee by contract were ineffective under R. S. 3477 (31 U. S. C. 203; Appendix, *infra*, pp. 44–45). It then amended its complaint to appear in a new light, that of assignee by operation of law. In the new light it had standing to sue, in the old it had none. Obviously, then, the variance was material. As it was material, the conclusion seems logical, as the court below held, that the variance was likewise fatal. Neither a refund nor a judgment for one could properly have been predicated on the claim for refund, and a timely claim on valid grounds would have been barred at the time when the amended complaint was filed.[22] Thus the condition for a suit for refund was not met. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Real Estate Title Co.* v. *United States*, 309 U. S. 13, 17–18.

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and *United States* v. *Andrews*, 302 U. S. 517, apparently was then abandoned by the District Court, since it proceeded to hold (R. 105) that petitioner's suit as assignee was barred by R. S. 3477 (31 U. S. C., 203).

[22] See footnote 20, *supra*, p. 35.

CONCLUSION

Each of the foregoing points is an independent ground sufficient to support the decision below. We respectfully submit that it should be affirmed.

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DECEMBER 1943.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 259:

TITLE IV—MANUFACTURERS' EXCISE TAXES

* * * * *

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

SEC. 621. CREDITS AND REFUNDS.

* * * * *

(c) In no case shall interest be allowed with respect to any amount of tax under this title credited or refunded.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate pur-

chaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

TITLE I—AGRICULTURAL ADJUSTMENT

* * * * *

Part 2—Commodity Benefits.

* * * * *

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the

time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * * *

(d) As used in part 2 of this title—

* * * * *

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

* * * * *

(7 U. S. C., 1940 ed., Sec. 609.)

* * * * *

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby. (7 U. S. C., 1940 ed., Sec. 614.)

SUPPLEMENTARY REVENUE PROVISIONS

* * * * *

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from

any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

* * * * *

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases. (7 U. S. C. 1940 ed., Sec. 647.)

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund

due any claimant with respect to such claim. * * *
(7 U. S. C. 1940 ed., Sec. 648.)

* * * * *

SEC. 913. DEFINITIONS.
When used in this title—

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

* * * * *

(7 U. S. C. 1940 ed., Sec. 655.)

* * * * *

Revised Statutes

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must

be acknowledged by the person making them, before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. (31 U. S. C. 1940 ed., Sec. 203.)

Treasury Regulations 46, Relating to Excise Taxes on Sales by the Manufacturer, promulgated under the Revenue Act of 1932:

> ART. 71.[1] [As amended by T. D. 4358, XI–2 Cum. Bull. 516 (1932).] *Credits and refunds.*— * * * The claim for refund must be supported by evidence showing (1) the name and address of the person who paid to the United States the tax for which refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used. A credit must be supported by evidence of the same character. If it is impossible to furnish such evidence at the time when the credit is taken, a statement to that effect must be submitted with the return in which the credit is taken. The evidence supporting such credit must be filed with the collector

[1] The paragraphs of Article 71 herein quoted were rephrased somewhat, without change of substance, by T. D. 4853, effective July 1, 1938 (1938–2 Cum. Bull. 383, 387–388). A new paragraph numbered (3) was added to Section 621 (a) of the Revenue Act of 1932, by Section 4 (c) of the Act of June 16, 1933, c. 96, 48 Stat. 254, 255, and this new paragraph was later amended by Section 401 (b), Revenue Act of 1935, c. 829, 49 Stat. 1014. The new paragraph of the act, however, is immaterial to the present controversy, as are also the several Treasury Decisions which add new paragraphs to Article 71 of Regulations 46, all designed to implement paragraph (3) of Section 621 (a) of the act.

within 30 days after the date on which the return is filed. If the required evidence is not so filed within that period, the amount of the credit will be disallowed and assessment of the tax resulting from the disallowance will be made on the current assess-

* * * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

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